UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC, and MARTIN AFFILIATED, LLC,

Plaintiffs,

vs.

APPLE COMPUTER, INC. and AFTERMATH RECORDS d/b/a AFTERMATH ENTERTAINMENT

Defendant.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

NOW COME Plaintiffs Eight Mile Style, LLC and Martin Affiliated, LLC by and through their attorneys, King & Ballow and Hertz Schram PC, and respectfully move this Court under Federal Rule of Civil Procedure 15(a) and Local Rule 15.1 for leave to amend their complaint in this matter to state copyright infringement claims against both defendants, Apple Computer ("Apple") and intervener Aftermath Records d/b/a Aftermath Entertainment ("Aftermath").

Plaintiffs met and conferred with Defendants regarding this motion on August 3, 2009; Defendants will oppose Plaintiffs' Motion, even though Defendants could not articulate any prejudice they would suffer by this proposed amendment, and even though Defendants themselves have repeatedly advised the Court that Plaintiffs' claims are against both Apple and Aftermath.

STATEMENT OF FACTS

Plaintiffs' complaint in this matter asked for damages and declaratory relief against Apple, alleging it reproduced and distributed certain compositions owned in whole or in part by Plaintiffs via iTunes. Doc. No. 1 ¶¶ 8-10. Defendants' first filing in this case, on September 7, 2007, was a stipulated order granting Aftermath Records d/b/a Aftermath Entertainment ("Aftermath") the right to intervene as a party in this action. Beginning with Defendants' answer, filed September 14, 2007, and at every opportunity since then, Defendants have contended that Apple was acting pursuant to authorization from Aftermath or its part-owner, UMG Recordings, Inc., and the merits of this case depended solely on whether the purported licenses from Aftermath and/or Universal were valid. Doc. No. 9 ¶¶ 12, 36; *see, e.g.,* Doc. No.

Both parties have litigated this case as though infringement claims were asserted against both Apple and Aftermath and, indeed, Defendants have admitted as much. For example, in their motion to bifurcate, Defendants wrote, "Plaintiffs allege that Defendants Aftermath Records ("Aftermath") and Apple Inc. ("Apple") (jointly "Defendants") have infringed upon Plaintiffs' claimed copyrights…" Doc. No. 38 at 7. In the same motion, Defendants acknowledged that Plaintiffs were seeking "Aftermath's profits attributable to the alleged infringement." *Id.* at 8. Similarly, in their Revised Motion for Summary Judgment, Defendants stated in their opening paragraph, "Plaintiffs now say that Apple and Aftermath Records…are liable for copyright infringement…" Doc. No. 66 at 9.

Since their intervention, this case has always focused on the actions, practices and policies of Aftermath, as well as Apple. For example, of the approximately 15 fact depositions Plaintiffs have taken in this case, approximately 13 were of individuals currently or previously employed by Aftermath and sought information concerning the drafting of the recording agreements between Eminem and Aftermath, Aftermath's understanding of the terms of those agreements, and Aftermath's practices relating to obtaining mechanical and digital licenses from Plaintiffs and other publishers. Busch Decl. ¶ 2. By contrast, Plaintiffs have deposed a grand total of two witnesses provided by Apple, one of which related solely to damages. *Id.* ¶ 3. Likewise, the vast majority of documents in this case have been produced from Aftermath's files – Apple has produced under 3,000 pages of documents, all but 375 pages of which pertain Plaintiffs' damages from a single song, whereas Aftermath has produced over 20,000 pages. *Id.* ¶ 4. Defendants' motion for summary judgment was also based entirely on the documents and activities of Aftermath, not Apple. *See* Doc. No. 66.

Thus, from its inception to date, virtually all efforts of the parties have been expended investigating the purported authorization granted by Aftermath to Apple for the infringing activities. Apple's only argument rests upon that authorization; if the authorization is valid, Apple claims it has obtained copyright licenses in the compositions; if it is invalid, Apple understands it is liable for copyright infringement. Likewise, if that authorization is not valid, Aftermath too has committed copyright infringement by distributing Plaintiffs' Compositions when it had no right to do so and by facilitating the infringement of Apple. There is literally no new discovery either Plaintiffs or Defendants will need if this claim is added.

Several outstanding motions were heard by the Court on December 4, 2008, including

Defendants' motion for summary judgment and their motion to bifurcate. *See* Doc. No. 109. The Court denied Defendants' motions at the close of oral argument, including their motion to bifurcate, and directed the parties to submit an order. Doc. No. 117 at 55-59. On February 24, 2009, the Court entered an Order denying the motions that had been heard in December and extended discovery through April 1, 2009. Doc. No. 118.

Plaintiffs and Defendants served written discovery requests on February 16, 2009 and February 26, 2009 respectively. Busch Decl. ¶ 5. Plaintiffs also emailed Defendants at that time seeking confirmation that both Aftermath and Apple were under an obligation to supplement their responses to the previously served document requests and interrogatories relating to Plaintiffs' damages. Busch Decl. ¶ 6, Ex. A. The parties stipulated that responses to the discovery requests served in February would be due May 8, 2009, with discovery then continuing from that date until June 10, 2009,[1] and the Court entered an agreed order to this effect. *See* Doc. No. 119.

On May 8, 2009, Defendants served a letter supplementing their responses to Plaintiffs' first sets of interrogatories and document requests to address the discovery requests related to damages for which they had previously refused to produce documents. In their letter, both defendants agreed to produce documents, but Aftermath also asserted a novel objection:[2]

> Aftermath is not under any obligation to produce material relating to damages from Plaintiffs' claims of infringement because there is no claim of infringement against Aftermath in this lawsuit….Without a claim of infringement against Aftermath, there can be no damages award for infringement from Aftermath.

See Busch Decl. ¶ 7, Ex. B.

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[1] Due to ongoing difficulty finding acceptable dates for depositions, the parties subsequently entered into further stipulations allowing outstanding depositions to be conducted through the end of August, 2009. *See* Doc. No. 123

[2] While Defendants objected to producing information related to damages discovery due to their impending motion to bifurcate, they did not object that Plaintiffs had no right to recover damages from Aftermath. Doc. No. 33-6

Despite this, in early May, 2009, Aftermath produced documents in response to Plaintiffs' outstanding discovery relating to damages, showing Aftermath's purported profits and losses.[3] Plaintiffs served their expert report on damages from both Aftermath and Apple on July 3, 2009. On July 27, 2009, Plaintiffs deposed Aftermath's 30(b)(6) representative concerning the documents it produced relating to damages. In that deposition, and in their objections to Plaintiffs' Rule 30(b)(6) notice, which Defendants served the same day, counsel for Defendants again raised Aftermath's objection that no claim of infringement had been asserted against Aftermath and as a result, Aftermath's profits and losses were irrelevant.

As a result, Plaintiffs now move to officially amend their complaint to assert a claim of direct, contributory and vicarious infringement against Aftermath on the same factual basis as Plaintiffs' claims against Apple, since that has been the issue litigated since Aftermath intervened, and all parties understood as much, as discussed above.

ARGUMENT

A. The Standard

A complaint may be amended at any time up to trial, during trial, and even after trial or an appeal. Fed. R. Civ. P. 15; *see, e.g., Tefft v. Seward*, 689 F.2d 637, 639-40 (6th Cir. 1982) (abuse of discretion to deny leave to amend filed after appeal); *Zatina v Greyhound Lines, Inc.*, 442 F.2d 238 (8th Cir. 1971) (allowing amendment following close of testimony was within district court's discretion); *Busam Motor Sales v Ford Motor Co.*, 203 F.2d 469 (6th Cir. 1953) (amendment following remand).

[3] Apple separately produced documents relating to the same that purported to show Apple's profits and losses.

When amendment is sought before trial but after a responsive pleading has been filed, leave to amend should be "freely" given "when justice so requires." Fed. R. Civ. P. 15(a)(2). Denial of leave to amend is disfavored. *Foman v. Davis,* 371 U.S. 178, 182 (1962). The Court may not deny a motion to amend without "justifying reason," and should assess factors that include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previously allowed amendments, undue prejudice to the opposing party, whether the amendment would be futile, and the interests of judicial economy. *Foman*, 371 U.S. at 182; *see also Commercial Money Ctr., Inc. v. Illinois U. Ins. Co.*, 508 F.3d 327, 346 (6th Cir. 2007). The Court should be guided by the underlying purpose of allowing amendments to facilitate a decision on the merits, rather than technicalities of pleadings. *See Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 425 (6th Cir. 1999). Leave to amend may be denied only upon a significant showing of undue prejudice to the party opposing the motion. *E.g., Security Ins. Co. of Hartford v. Kevin Tucker & Assoc., Inc.,* 64 F.3d 1001, 1009 (6th Cir. 1995). Courts are particularly hesitant to deny amendment when the interest in resolving all related issues militates in favor of such a result and no prejudice is demonstrated. *Budd v. Travelers Indem. Co.,* 820 F.2d 787, 791 (6th Cir. 1987). A court will permit a party to add new claims and even a new legal theory long as it arises out of the same transaction or occurrence. *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 248-249 (6th Cir. 2000).

B. Leave to Amend the Complaint will Not Result in Prejudice or Delay

Discovery in this case has always focused on Aftermath's role in purporting to grant Apple licenses for the uses of the Eminem Compositions at issue, not on the actions of Apple. As explained above, Plaintiffs have deposed Aftermath's witnesses and obtained documents from Aftermath relevant to their claims. Even damages discovery against Aftermath has been taken. Defendants have repeatedly stated to this Court that the claims of Plaintiffs are against Aftermath and Apple. *E.g.,* Doc. No. 38 at 7; Doc. No. 66 at 9. Defendants cannot demonstrate any prejudice that would result from adding the infringement claims against Aftermath described above, which has been the issue litigated.

As discussed above, a motion to amend should only be denied if it would result in unfair prejudice to the Defendants, even if there has been some delay in bringing the motion. *See, e.g. Commer. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 347 (6th Cir. Ohio 2007) (quoting *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002)). "Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading[.]" *Security Ins. Co. v. Kevin Tucker & Assocs.*, 64 F.3d 1001, 1009 (6th Cir. 1995) (reversing denial of motion to amend when plaintiff had delayed 16 months in filing). Even extremely lengthy delays are no reason to deny leave to amend where the defendants will not suffer any prejudice. *See, e.g., Tefft*, 689 F.2d at 639-40 (6th Cir. 1982) (reversing district court's denial of leave to amend where plaintiff waited four years, including an intervening appeal, before seeking to amend his complaint to allege a constitutional tort rather than assault and battery). Here, the first time Defendants ever implied that Plaintiffs could not recover damages against Aftermath was in a letter dated May 8, 2009, even though it then produce 44 profit and loss statements on behalf of Aftermath. Busch Decl. ¶ 8. When Defendants first raised this issue less than three months ago, Plaintiffs believed an agreement on this issue would be reached. Plaintiffs now file this motion immediately upon having met and conferred with Defendants, who stated they would rely on this objection despite their numerous admissions discussed above. Even the three months that have passed since Defendants first raised this issue is not the kind of delay that would justify denial of a motion to amend. *E.g., Morse*, 290 F.3d at 800 (over 3 years); *Moore v. Paducah*, 790 F.2d 557, 558 (6th Cir. 1986) (over 2 years); *Tefft*, 689 F.2d at 639-40 (4 years). Plaintiffs now move to amend the complaint less than three months after the issue initially arose, far less time than the years allowed in prior Sixth Circuit cases.

While prejudice may result if the defendant would be required to respond to "a distinct new claim of infringement," that is simply not the case here. Plaintiffs seek only to assert the same claim of infringement against Aftermath that has already been asserted against Apple, the claim which Aftermath has not only had the opportunity to litigate, *but has actually litigated*. This amendment would not prejudice Defendants at all and stands in sharp contrast to cases where the Sixth Circuit has found such prejudice. *See, e.g., Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 806 (6th Cir. 2005) (leave to amend properly denied where plaintiff sought to add claims concerning a new composition against new parties near the end of discovery). By contrast, where adding a claim would not necessitate any additional discovery, leave to amend should be granted. *See, e.g., In re Air Crash*, No. 5:06-CV-316 – KSF; 2008 U.S. Dist. LEXIS 50460 *17-*18 (E.D. Ky. June 25, 2008); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998) (denying leave where amendment would cause "many key individuals" to be re-deposed).

Prejudice to the opposing party may also be found if an amendment will "adversely affect[] its posture in the litigation." *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983) (amendment proper where opposing party could not demonstrate insufficient time to conduct discovery, unfair surprise by a change in theories, or inability to rebut new theory at trial). Defendants cannot claim any prejudice due to insufficient time to conduct discovery or unfair surprise, since, as described above, discovery has been conducted as though Plaintiffs' infringement claims were asserted against both Apple and Aftermath. No additional discovery would be needed and no additional trial time would be needed to prove the relevant facts, since Plaintiffs' claims against Aftermath are based on precisely the same facts as the claims against Apple. While a small amount of time in trial will be needed to prove the amount of Plaintiffs' damages from Aftermath, such testimony would be presented alongside testimony regarding Plaintiffs' damages from Apple by testimony from the same expert witness concerning damages from both defendants. Busch Decl. ¶ 9.

Furthermore, both Defendants have been represented throughout this litigation by the same counsel. Aftermath, through its counsel, has participated in, if not driven the discovery and litigation through of all aspects of this case. Aftermath cannot be put in the position of a "new" defendant added to a case after discovery has taken place because it has been a named defendant since.

Courts should also consider if the proposed amendment would adversely affect judicial economy. *See, e.g., Chitimacha Tribe of La. V. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) (court considers whether the amendment would lead to expeditious disposition of litigation on the merits). Here, allowing the amendment would add to judicial economy, not detract from it. First, as explained above, adding Plaintiffs' infringement claim against Aftermath would necessitate no additional discovery. Second, if Plaintiffs' infringement claim against Aftermath were not added to this case and Plaintiffs prevailed against Apple, they would have to file an entirely new lawsuit against Aftermath to pursue the same claims under the same facts as against Apple. It would clearly serve the interests of judicial economy to allow these nearly identical claims to be decided in one suit, instead of two.

Finally, the Court should also consider whether the proposed amendment will be "futile." *See, e.g., Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 460 (6th Cir. 2001) (proposed amendment would be futile where claims were barred by statute of limitations); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1041-42 (6th Cir. 1991) (amendment not allowed if amended complaint would not survive Fed. R. Civ. P. 12(b)(6) motion) (citing *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983)). Plaintiffs' claims against Aftermath are not barred by any statute of limitations, particularly since they would relate back to the filing of the original complaint, *see* Fed. R. Civ. P. 15(c), Plaintiffs' proposed claims against Aftermath are legally sufficient.

CONCLUSION

For the reasons described above, the Court should grant Plaintiffs leave to amend the complaint.

Dated: August 6, 2009

Respectfully submitted,

/s/Richard S. Busch

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served via the Court's Electronic Filing System:

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this 6th day of August 2009.

s/ Richard S. Busch